EON BANK BHD

v.

GANDARAMA SDN BHD

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[ORIGINATING SUMMONS NO: 24-1231-2001]
3 AUGUST 2006

LAND LAW: *Charge - Foreclosure - Order for sale - Whether application for order for sale can be struck out on grounds of non-registration of vesting order by chargee - No affidavit filed by chargor to show existence of cause to the contrary - Omission to register vesting order curable so long as no real prejudice will result to chargor - National Land Code, ss. 256, 420 - Rules of the High Court 1980, O. 18 r. 19, O. 56, O. 83 & O. 92 r. 4 - Banking and Financial Institutions Act 1989, s. 50*

CIVIL PROCEDURE: *Striking out - No reasonable cause of action - Foreclosure proceedings - Whether application for order for sale can be struck out on grounds of non-registration of vesting order by chargee - Whether no reasonable cause of action disclosed - Whether court can consider affidavit filed in support of originating summons in determining whether there is a reasonable cause of action - Whether striking out ought to be allowed where alleged defect can be corrected by an amendment - Rules of the High Court 1980, O. 18 r. 19 & O. 92 r. 4*

By way of an originating summons, the plaintiff *inter alia* applied against the defendant for an order for judicial sale of 29 pieces of land pursuant to two charges over the lands. The application for an order for judicial sale was made under s. 256 of the National Land Code 1965 ('NLC') and read together with O. 83 of the Rules of the High Court 1980 ('RHC') *ie*, foreclosure proceedings. The defendant applied to *inter alia* to strike out the originating summons pursuant to O. 18 r. 19(1)(a) of the RHC on the ground that the originating summons did not disclose any reasonable cause of action and under the inherent jurisdiction of the court under O. 92 r. 4 of the RHC. The Senior Assistant Registrar dismissed the defendant's application and the defendant filed this appeal to the judge in chambers pursuant to O. 56 of the RHC. At the appeal, the defendant claimed that the plaintiff had failed to cause to register the vesting order dated 5 December 2000 (for the transfer of the business from Oriental Bank Berhad to the plaintiff) ('the said vesting order') granted by the High Court, Kuala Lumpur pursuant to s. 50 of the Banking and Financial Institutions Act 1989 ('BAFIA') at the Registrar of Titles as required by the terms of the said order and pursuant to

A s. 50(5) and (6) of the BAFIA and in accordance with s. 420(1) of the NLC. The defendant contended that if the said vesting order cannot be enforced there was no cause of action against the defendant as the registration of the said vesting order under the NLC is mandatory and is a condition precedent to the claim of interest in land. On the other B hand, the plaintiff submitted that the fact that the said vesting order had yet to be registered with the Registrar of Titles was not fatal to the plaintiff's foreclosure proceedings against the defendant.

Held (dismissing the defendant's application):

C **(1)** The plaintiff had obtained all the rights of the transferor Bank by virtue of the said vesting order to commence foreclosure proceedings against the defendant on the registered charges as the transferee-successor/bank as the charged properties had been vested in the plaintiff. A plaintiff clothed with the vesting order has the D legal capacity to commence to enforce the statutory remedy provided under s. 256 of the NLC. (paras 18 & 19)

(2) The order for sale granted to a chargee upon an application under s. 256 of the NLC does not constitute a judgement debt and the order to be granted is pursuant to the chargee's statutory remedy E under NLC. If the defendant or the chargor wishes to oppose the application of the order for sale, he or she has to show the existence of cause to the contrary as provided under s. 256(3) of the NLC and this is done by filing an affidavit in reply to the originating summons and the affidavit in support. The defendant did F not file an affidavit in reply to show the existence of cause to the contrary or raised any preliminary objection. Instead, the defendant chose to invoke O. 18 r. 19(1)(a) of the RHC to strike out the originating summons, which was an extreme and drastic step to proceed for the reason of non-compliance of the registration of the G said vesting order. Justice would not be served by allowing the defendant's application to strike out the originating summons on technicalities. (paras 21 & 23)

(3) The power to dismiss or strike out the pleadings summarily is a drastic power and should be exercised with utmost caution. Striking H out pleadings for having disclosed no reasonable cause of action is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief which he asks for. If an action contains a point of law requiring serious I argument, it is not appropriate to strike it out. (paras 27 & 30)

(4) No evidence or affidavit evidence is admissible on an application to strike out any pleading for having disclosed no reasonable cause of action. Nevertheless, the court can consider the affidavit which has already been filed in support of the originating summons. (para 31)

(5) Where the pleadings are defective and the opponent seeks to strike out the pleadings, the court ought not to act summarily if an amendment can correct the defect. (para 32)

(6) The omission to register the said vesting order was curable so long as no real prejudice will result to the defendant. The defendant had not shown any prejudice having been caused. There was also no fundamental breach which went to the root of the charge to vitiate the foreclosure proceedings. It may be remedied by presently causing a copy of the said vesting order to be served on the Registrar of Title. (para 46)

(7) The inherent jurisdiction of the court ought not to be applied against the plaintiff. Instead O. 92 r. 4 of the RHC should be invoked in favour of the plaintiff in order to prevent injustice to the plaintiff. (para 63)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***

American International Assurance Co Ltd v. Union Builders Malaysia Sdn Bhd [1973] 1 MLJ 95 ***(refd)***

Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmill (M) Sdn Bhd & Ors (No 2) [1997] 2 CLJ 406 CA ***(refd)***

ARRM Arunasalam Chetty Son of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style of Mun Seng Hin Kee & Ors [1937] MLJ Rep 16 ***(foll)***

Associate Finance Corporation Ltd v. Poomani [1972] 1 MLJ 117 ***(refd)***

Ban Guan Sendirian Bhd v. United Malaysian Steel Mills Berhad [1977] 2 MLJ 52 ***(foll)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(foll)***

Bank Of Commerce (M) Bhd v. Selangor Frits & Glazes Sdn Bhd [1998] 4 CLJ 899 HC ***(foll)***

Boustead Trading [1985] Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(foll)***

BSN Merchant Bank Bhd v. George Thomas [2000] 3 CLJ 325 CA ***(foll)***

Chong Chee Yan v. Golden Dragon Garden Sdn Bhd [1999] 3 CLJ 151 HC ***(foll)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(foll)***

Chung Khiaw Bank Ltd v. Multidev Sdn Bhd & Ors [1979] 1 MLJ 93 ***(foll)***

Co-Operative Central Bank Ltd (In receivership) v. Feyen Development [1995] 4 CLJ 300 FC ***(foll)***

A *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144 HC* ***(foll)***
Coruma Holdings Ltd v. C Itoh Ltd & Ors [1990] 3 ACSR 438 ***(foll)***
Dato Mohamed Shamsuddin v. Attorney-general Of Hongkong [1986] 2 MLJ 112 ***(foll)***
Dato' Fathi Hj Ahmad v. Standard Chartered Bank Malaysia Bhd [2006] 1 CLJ
B *273 CA* ***(foll)***
Davy v. Garrett [1877] Ch D 473 ***(refd)***
Dyson v. A-G [1911] 1 KB 410 ***(foll)***
Fels v. Knowles [1906] 26 NZLR 604 ***(foll)***
Gibbs v. Messer [1891] AC 248 ***(refd)***
Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Snd Bhd [1992] 4 CLJ 2212
C *SC* ***(foll)***
Harkness v. Bell's Asbestos And Engineering Ltd [1967] 2 QB 729 ***(foll)***
Hii Teng Tuong Alphonsus v. Lok Min Wah & Ors [1995] 4 MLJ 259 ***(foll)***
Holidays Sdn Bhd and Wilkins v. Kannamal [1951] MLJ 99 ***(refd)***
Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor And Another Appeal
D *[1998] 3 CLJ 253 CA* ***(refd)***
Ibrahim Mohamad v. Ketua Polis Daerah Johor Bahru & Ors [1996] 5 MLJ 15 ***(refd)***
Idris Hj Salleh v. Federal Auto Holdings Bhd [1979] 2 MLJ 141 ***(refd)***
Imtiaz Ahmad v. Ghulam Ali PLD [1963] SC 382 ***(refd)***
Johannes Koplan v. Aw Chen [1970] 1 MLJ 220 ***(refd)***
E *Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 SC* ***(refd)***
Karuppiah Chettiar v. Subramaniam [1971] 32 MLJ 116 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 ***(foll)***
Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 2 CLJ 1 HC ***(refd)***
KSM Insuran Bhd lwn. Amanah Chase Merchant Bank Berhad [1992] 1 MLJ 651
F ***(refd)***
Kuala Lumpur Finance Bhd v. KGV & Associates Sdn Bhd [1995] 1 CLJ 519 HC ***(refd)***
Kuala Lumpur Finance Bhd v. Yap Poh Khian (Teo Sik Eng & Anor, Interveners) [1992] 1 MLJ 472 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 5 MLJ 313 ***(foll)***
G *Leong Moh Sawmill Co Sdn Bhd (In Liquidation) v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA* ***(foll)***
Lim Cheng v. Sandanam [1962] 28 MLJ 254 ***(refd)***
Lim Kit Siang v. Pemangku Ketua Polis Daerah, Butterworth & Ors [1988] 2 MLJ 648 ***(refd)***
Lim Weow @ Lim Neu v. Perwira Habib Bank Malaysia Bhd [2001] 2 AMR 1307
H ***(refd)***
Liu, Ren-shuenn v. Lee, Chiu Pin [1999] 2 CLJ 35 HC ***(refd)***
Loke Yes v. Port Swettenham Rubber Co [1913] AC 491 ***(refd)***
Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***
I *Low Lee Lian v. Ban Hin Lee Bank Bhd [1999] 1 MLJ 99* ***(foll)***
LYN Country Sdn Bhd v. Eic Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 HC ***(foll)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 CA ***(foll)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 ***(foll)***
Malayan United Finance Berhad lwn. Tan Ah Moi & Satu Lagi [1993] 2 CLJ 427 HC ***(foll)***
Malaysian International Merchant Bankers v. Dhanoa Sdn Bhd [1988] 1 MLJ 257 ***(refd)***
Mokhtar Amin v. Mohamed Mokhtar Omar [2001] 4 CLJ 489 CA ***(refd)***
Multi-purpose Bank Bhd v. Maimoon Abdul Razak [1999] 3 CLJ 21 HC ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 MLJ 300 ***(refd)***
New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC ***(foll)***
OCBC Bank (M) Berhad v. Lean Seng Pottery Factory Sdn Bhd [1999] 2 MLJ 402 ***(foll)***
OCBC Bank (M) Bhd v. Astano Electric Sdn Bhd [1999] 8 CLJ 369 HC ***(foll)***
Oh Hiam & Ors v. Tham Kong [1980] 2 MLJ 159 ***(refd)***
Oh Thevesa v. Sia Hok Chai [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148 HC ***(refd)***
Oriental Bank Bhd v. Mohinder Pal Kaur [1996] 1 MLJ 788 ***(foll)***
Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 3 MLJ 493 ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(foll)***
Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn Bhd [1996] 4 MLJ 489 ***(foll)***
Peck v. Russell [1923] 4 JMSLR 32 ***(refd)***
Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd [1996] 1 CLJ 257 CA ***(foll)***
Perwira Habib Bank (M) Bank Bumiputra (M) Bhd [1988] 3 MLJ 54 ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(foll)***
Phileoallied Bank (M) Bhd v. Koshish Credit & Leasing Sdn Bhd [2001] 4 CLJ 788 HC ***(refd)***
Phileoallied Bank (Malaysia) Berhad v. Narendran Thambimuthu [1999] 8 CLJ 394 HC ***(foll)***
Phuman Singh v. Kho Kwang Choon [1965] 2 MLJ 189 ***(refd)***
Pilot Cargo (M) Sdn Bhd & Anor v. Adinas Tours & Travel Sdn Bhd & Ors [2002] 6 CLJ 442 HC ***(foll)***
Public Bank Bhd lwn. Search Realty (M) Sdn Bhd [2001] 3 MLJ 119 ***(refd)***
R v. The Committee of Llyod's ex parte Moran Queen's Bench Division, The times 24th June 1983 ***(foll)***
Re Cainess Knapman v. Servian [1978] 2 All ER 1 ***(foll)***
Re Helsby; Ex P The Trustee [1994] 1 QB 742 ***(refd)***
Riches v. Director Of Public Prosecutions [1973] 2 All ER 935 ***(refd)***
S Manickam & Ors v. Ismail Mohamad & Ors [1997] 2 MLJ 90 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 96 ***(foll)***
Shaik Zolkaffily Shaik Natar & Ors v. Majlis Agama Islam Pulau Pinang Dan Seberang Perai [1997] 4 CLJ 70 HC ***(foll)***

A *Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA* ***(refd)***
Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors [1998] 1 MLJ 607 ***(foll)***
Syed Ahamed Abdul Salam & Ors v. Naina Mohamed & Sons (Penang) Sdn Bhd [1998] 3 CLJ Supp 81 HC ***(refd)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 MLJ 81 ***(foll)***
B *Taitapu Gold Estates v. Prouse [1916] NZLR 825* ***(foll)***
Tan Chwee Geok & Anor v. Khaw Yen-yen & Anor [1975] 2 MLJ 188 ***(foll)***
Tan Keat Seng Kitson v. Kerajaan Malaysia [1996] 2 CLJ 722 HC ***(refd)***
Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2003] 1 CLJ 634 CA ***(foll)***
The Sardinia Sulcis [1991] 1 Lloyd's Rep 201 ***(refd)***
Thynne v. Thynne [1955] 2 All ER 377 ***(refd)***
C *Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1* ***(foll)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 FC ***(foll)***
United Malayan Banking Corp Bhd v. Chong Bun Sun And Another Application [1994] 2 CLJ 673 HC ***(foll)***
D *United Malayan Banking Corp Bhd v. Tan Kay Hock [1997] 4 CLJ 717 CA* ***(refd)***
United Malayan Banking Corporation Bhd v. Pembinaan KSY Sdn Bhd & Ors [1993] 3 MLJ 45 ***(foll)***
Wilkins v. Kannamal [1951] MLJ 99 ***(foll)***
Williams and Humbert Ltd v. W & H Trade Marks (Jersey) Ltd [1986] 1 AC 368 ***(foll)***
E *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 2 MLJ 240* ***(foll)***
Yorkshire Regional Health Authority v. Fairclough Building Ltd And Anor [1996] 1 All ER 519 ***(foll)***
Zakaria Mohamed Esa v. Dato Abdul Aziz Ahmad & Ors [1985] 2 MLJ 222 ***(refd)***
Zubir Mustafa v. Tenaga Nasional Bhd & Anor [2005] 2 CLJ 51 CA ***(foll)***

F **Legislation referred to:**

Banking and Financial Institutions Act 1989, s. 50(3), (4), (5), (6)(b), (c)
National Land Code, ss. 256(3), 258(1)(b), (2)(a), 260, 304(2), 415, 417, 420(1), (2)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (2), O. 56, O. 83, O. 92
G r. 4

For the plaintiff/respondent - Chong Kok Keun; M/s KW Chong & Partners
For the defendant/appellant - Chee Weng Weng; M/s Chee Weng Weng & Co

Reported by Amutha Suppayah

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JUDGMENT

VT Singham J:

[1] By an originating summons dated 24 December 2001 (encl. 1) the plaintiff has *inter alia* applied against the defendant for an order for judicial sale of the properties, namely 29 pieces of land pursuant to two charges dated 10 June 1997, one charge which is over 17 pieces of land and the other charge which is over 12 pieces of land was registered at the Registrar of Titles on 11 June 1997 and 23 June 1997 respectively. The application for an order for judicial sale was made under s. 256 of the National Land Code Act No. 56 of 1965 (hereinafter referred to as the 'NLC') and read together with O. 83 of the Rules of the High Court 1980 (hereinafter referred to as the 'RHC 1980') (an action for an order for sale of the land which in this jurisdiction is loosely and commonly referred to as "foreclosure proceedings" (See s. 256 of the NLC)).The originating summons is supported by an affidavit affirmed on 24 December 2001 by the manager of the plaintiff - bank (encl. 2).The defendant's solicitors filed the memorandum of appearance dated 26 January 2002 on 31 January 2002 (encl. 3). Subsequently, the plaintiff applied by summon in chambers dated 4 April 2002 (encl. 4) to amend the originating summons (encl. 1). On 8 July 2002 the deputy registrar of the High Court, Ipoh granted the plaintiff's application (encl. 4) to amend the originating summons (encl. 1). The amended originating summons was filed on 19 July 2002 (encl. 6).

[2] By an application dated 24 September 2002 (encl. 9), the defendant, through his solicitors applied to the Registrar of the High Court, Ipoh *inter alia* to strike out the amended originating summons (encl. 6) pursuant to O.1 8 r. 19(1)(a) of the RHC 1980 on the ground that the amended originating summons did not disclose any reasonable cause of action and under the inherent jurisdiction of this court under O. 92 r. 4 of the RHC 1980. On 15 September 2003, the Senior Assistant Registrar dismissed the defendant's application (encl. 9) with costs. Hence, the defendant through their solicitors filed this notice of appeal to the judge in chambers (encl. 10) pursuant to O. 56 of the RHC 1980.

[3] At the appeal, the defendant's counsel submitted as follows:

(1) The plaintiff has failed to cause to register the vesting order dated 5 December 2000 (exh. TKH-3) (hereinafter referred to as 'the said vesting order') granted by the High Court, Kuala Lumpur *vide* Originating Summons No: D-9-24-303-00 pursuant to s. 50 of the Banking and Financial Institutions Act 1989 (hereinafter referred to as the 'BAFIA') at the Registrar of Titles as required by the terms

of the said order particularly (r) and pursuant to s. 50(5) and (6) of the BAFIA and in accordance with s. 420(1) of the NLC. The copy of the said vesting order is attached to the originating summons (encl. 1). In the said vesting order, the High Court, Kuala Lumpur fixed 1 January 2001 as the effective date for the transfer of the business from Oriental Bank Berhad to the plaintiff – EON Bank Berhad.

(2) The crux of the contention of the defendant's counsel on the application to strike out the amended originating summons on the ground that there is no reasonable cause of action is that, the plaintiff has failed to comply with the terms, particularly para. (r) of the said vesting order and as required by the s. 50(5) and (6) of the BAFIA and s. 420(1) of the NLC ie, the plaintiff had failed to cause to register the said vesting order dated 5 December 2000.

(3) Paragraphs (a), (r) and (i) of the said vesting order states as follows:

(a) Pemindahan keseluruhan perniagaan bank Oriental Bank Berhad kepada EON Bank Berhad termasuk aset-aset dan liabiliti-liabiliti dan apa-apa perniagaan yang berkaitan dengan perniagaan – bank Oriental Bank Berhad (kemudian dari ini disebut sebagai perniagaan) dan ini disahkan oleh mahkamah yang mulia ini, untuk memberi kesan kepada terma-terma dan syarat-syarat seperti yang terkandung di dalam suatu "Perjanjian Perolehan" ("acquisition agreement") bertarikh 30 June 2000 (kemudian dari ini disebut sebagai perjanjian perolehan) di antara Oriental Bank Berhad (kemudian dari ini disebut sebagai "Pemindah"dan EON Bank Berhad (kemudian dari ini disebut sebagi "Penerima Pindahan")) bagi pemindahan Perniagaan kepada Penerima Pindahan dan kesemua perkataan dan ungkapan yang ditafsirkan di bawah ini sama ada juga ditafsirkan dengan serupa di dalam perjanjian perolehan hendaklah mempunyai erti seperti berikut:

(r) bagi tujuan perletakhakan apa-apa tanah, termasuk tanah-tanah atau bahagian di dalamnya yang dipegang oleh pemindah untuk penerima pindahan dari dan pada tarikh pemindahan, *kemasukan atau pemfailan sesalinan yang disahkan mengikut mana-mana yang berkenaan, perintah Mahkamah yang mulia ini dengan pihak berkuasa pendaftaran menurut mana-mana undang-undang*, sama ada di sisi persekutuan atau negeri, yang berhubung dengan tanah-tanah tersebut, akan diterima oleh pihak berkuasa pendaftaran tersebut dan pihak berkuasa pendaftaran tersebut akan mendaftarkan perintah mahkamah yang mulia ini dan pendaftaran yang sedemikian akan berkesan untuk meletakhak

tanah tersebut, termasuk tanah-tanah atau sebahagian daripadanya atau kepentingan di dalamnya ke atas nama penerima pindahan selanjutnya. (emphasis added). A

(i) di mana tanah-tanah sedemikian terletak di Semenanjung Malaysia, *mana-mana peguamcara atau firma peguamcara yang mewakili pihak Pemindah dan atau Penerima Pindahan diberikuasa oleh Mahkamah Yang Mulia ini untuk menyebabkan sesalinan atau sesalinan yang disahkan, apa-apa perintah yang dibuat oleh Mahkamah Yang Mulia ini disampaikan ke atas Pendaftar Hak Milik atau Pentadbir Tanah, menurut keadaannya seberapa segera yang praktik selepas Perintah tersebut dibuat*, dan Pendaftar Hak Milik atau Pentadbir Tanah yang berkenaan, adalah dengan ini diperintahkan untuk menguatkuasakan perintah tersebut dengan: (emphasis added) B C

(aa) membuat suatu memorial berkenaan perletakhakan itu di atas daftar dokumen hakmilik kepada tanah-tanah tersebut atau sebahagian di dalamnya atau kepentingan di dalamnya; D

(bb) membuat suatu salinan memorial di atas dokumen hakmilik keluaran kepada tanah-tanah tersebut atau, di mana Perintah tersebut berhubungan dengan satu pajakan atau gadaian, atas penduanya, atas penyerahan dokumen hakmilik keluaran tersebut; E

(cc) menandatangani dan memeterai tiap-tiap memorial yang dibuat olehnya yang disebut di atas; F

(dd) menyebabkan notis tindakannya yang tersebut di atas, diserahkan kepada sesiapa atau mana-mana pihak kalau badan-badan yang mempunyai satu tuntutan yang dilindungi melalui kaveat ke atas tanah-tanah tersebut atau mana-mana bahagian atau kepentingan di dalamnya G

(4) The plaintiff's solicitors failed to cause the certified true copy of the said vesting order to be served on the Registrar of Titles. Therefore, the said vesting order cannot be enforced until it is registered. H

(5) Consequently, if the said vesting order cannot be enforced there is no cause of action against the defendants as the registration of the said vesting order under the NLC is mandatory and is a condition precedent to the claim of interest in land. I

(6) Section 50(1) to (6) of the BAFIA and s. 420(1) of the NLC contemplate the essential requirement of registration of vested interest.

A (7) The case *Phileoallied Bank (M) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788 relied on by learned counsel for the plaintiff, in opposing the application to strike out the amended originating summons has only dealt with s. 50(3) of the BAFIA. The court in that case had overlooked the provision and effect of s. 50(4), (5),
B (6) of the BAFIA and so is the Court of Appeal in *Leong Moh Sawmill Co Sdn Bhd (In Liquidation) v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131 which had not considered the said provision. Therefore, there is a misconception in the decision in that case and this court ought to disregard that decision as it had blatantly failed
C to consider the vital part of s. 50(5) and (6) of the BAFIA.

(8) Section 50(3) of the BAFIA was never meant to override the provision of s. 420(1) of the NLC as held by the High Court in *PhileoAllied Bank*'s case because in that case the court had failed to consider s. 50(4), (5), (6) of the BAFIA.

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(9) Paragraph (r) of the said vesting order is similar vein to s. 420(1) of the NLC. The plaintiff has no *locus standi* to bring this foreclosure proceeding against the defendant without having had registered the said vesting order.

E (10) Accordingly, the decision of the learned Senior Assistant Registrar of the High Court, which had dismissed the defendant's application to strike out the amended originating summons should be reversed and the appeal be allowed. Consequently, the amended originating summons should be struck out.

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[4] On the other hand, the plaintiff's counsel submitted as follows:

(1) as the defendant's application to strike out the plaintiff's amended originating summons is made under O. 18 r. 19(1)(a) of the RHC 1980, no supporting affidavit is required to be filed.

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(2) The summary procedure to dismiss a case can only be adopted when it can clearly be seen that the claim or answer on the face of it is obviously unsustainable.

(3) The fact that the said vesting order is yet to be registered with
H Registrar of Titles is not fatal to the plaintiff's foreclosure proceeding against the defendant.

(4) The registration of the said vesting order with the Registrar of Titles is not mandatory and relied on the following cases:

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(i) *Phileoallied Bank (M) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788

(ii) *Leong Moh Sawmill Co Sdn Bhd (In Liquidation) v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131

(iii) *Zubir bin Mustafa v. Tenaga Nasional Berhad & Ors* [2005] 2 CLJ 51

(iv) *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36

(5) By virtue of s. 50(3) of the BAFIA, once the said vesting order dated 5 December 2000 was granted by the court, the order shall have effect according to it terms "notwithstanding anything in any law or in any rule of law "and shall be binding on any person thereby effected.

(6) Even if s. 50(6) of the BAFIA contemplates registration of the said vesting order with the registrar of titles, the said vesting order shall have effect according to it's terms as soon as it was granted by the court irrespective of the fact that it has yet to be registered with the registrar of titles.

(7) As the application to strike out the amended originating summons is filed under O. 18 r. 19(1)(a) of the RHC 1980, the burden is on the defendant to establish its case within the principle set out in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36.

(8) The defendants have failed to establish that this is a plain and obvious case for striking out the pleadings.

(9) Accordingly, the appeal should be dismissed with costs. The plaintiff's counsel also relied on the case of *BSN Merchant Bank Bhd v. George a/l Thomas* [2000] 3 CLJ 325.

[5] In reply, the defendant's counsel submitted as follows:

(1) If the Registrar of the court had not caused a copy of the said vesting order to be served on the Registrar of Titles, the transferee – bank ie, the plaintiff has to do it and cannot be left in vacuum, and before enforcement can be carried out and come into effect, the registration of the said vesting order is required under para. (r)(i) of the said vesting order and the same has to be registered. The party who wishes to take over the rights must be the registered chargee pursuant to the NLC and since the said vesting order is not registered, the plaintiff had no cause of action and in short, no *locus standi*.

A (2) On the face of the cause papers there is a big lacuna and the plaintiff has no right to enforce the charge as the said vesting order has not been shown to the Registrar of Titles.

(3) Therefore, the appeal ought to be allowed with costs.

B **Decision**

[6] In order to appreciate the arguments of both learned counsels and the cases referred to, it is important to reproduce the relevant provisions of the BAFIA and the NLC cited to this court. In the meantime, it is C important to state that on 3 August 2006 this court had delivered an oral judgment when it dismissed the defendant's application to strike out the plaintiff's amended originating summons (encl. 6). This court had informed both the parties that due to the urgency to dispose of the defendant's application, this court would deliver an oral judgment which contain only the summary of the grounds of judgment. However, with D the consent of both the parties, this court had deferred the release of the grounds of judgment with the details of the grounds and the supporting cases which were already included in the draft of grounds of judgment as it required proof reading. In other words, the oral judgment which was read in court was a summary of the grounds of judgment E and the decision remained the same. Accordingly, this is the grounds of judgment of the decision which was delivered on 3 August 2006.

[7] For easy reference and convenience, it is important to reproduce the relevant statutory provision for the purpose of this judgment.

F S. 50(1) – (6) of the BAFIA states as follows:

(1) Where the Minister has granted his approval under section 49(7) to an application in respect of an agreement or arrangement under section 49(1)(b) or (c), the licensed institution whose business is to be transferred (hereinafter referred to as "the G transferor") and the licensed institution or other person to whom the transfer is to be made (hereinafter referred to as "the transferee") may make a joint application to the High Court by way of an *ex parte* originating summons for enable the agreement or arrangement being given effect to, an in such application there H may be sought all or any of the following orders:

(a) the date on and from which the agreement or arrangement shall take effect, being a date earlier or later than the date of the application (hereinafter in this section referred to as "the transfer date");

I (b) the vesting of any property held by the transferor, either alone or jointly with any other person, in the transferee either alone or, as the case may be, jointly with such other person,

on an from the transfer date, in the same capacity, upon the trust, and with and subject to the powers, provisions and liabilities applicable thereto respectively;

(c) for any existing instrument, whether in the form of a deed, will or otherwise, or order of any court, under or by virtue of which any property became vested in the transferor, to be construed and to have effect as if for any reference therein to the transferor there were substituted a reference to the transferee;

(d) for any existing agreement to which the transferor was a party to have effect as if the transferee had been a party thereto instead of the transferor;

(e) for any account between the transferor and its customer to become an account between the transferee and the customer, subject to the conditions and incidents as theretofore, and such account to be deemed for all purposes to be a single continuing account;

(f) for any existing instruction, order, direction, mandate, power of attorney, authority, undertaking or consent, whether or not in relation to an account, given to the transferor, either alone or jointly with another person, to have effect, in respect of anything due to be done as if given to the transferee either a alone or, as the case may be, jointly with the other person;

(g) for any negotiable instrument or order for payment of money drawn on, or given to, or accepted or endorsed by, the transferor or payable at the place of business of the transferor, whether so drawn, given, accepted or endorsed before, on, or after, the transfer date, to have the same effect on and from the transfer date, as if it had been drawn on, or given to, or accepted or endorsed by, the transferee or were payable at the place of business of the transferee;

(h) for the custody of any document, goods or thing held by the transferor as bailee immediately before the transfer date to pass to the transferee and the rights and obligations of the transferor under any contract of bailment relating to any such document, goods or thing to be transferred to the transferee;

(i) for any security held immediately before the transfer date by the transferor, or by a nominee of, or trustee for, the transferor, as security for the payment or discharge of any liability of any person, to be held by the transferee or, as the case may be, to be held by that nominee or trustee as the nominee of, or trustee for, the transferee, and to the extent

of those liabilities, be available as aforesaid to, to transferee as security for future advances by, and future liabilities to, the transferee in the same manner in all respects as future advances by, or future liabilities to, the transferor were secured thereby immediately before the transfer date;

(j) where any right or liability of the transferor is transferred to the transferee, for the transferee to have the same rights, powers and remedies (and in particular the same rights and powers as to taking or resisting legal proceedings or making or resisting applications to any authority) for ascertaining, protecting or enforcing that right or resisting that liability as if it had at all times been a right or liability of the transferee including those rights or liabilities in respect of any legal proceedings or applications to any authority pending immediately before the transfer date by or against the transferor;

(k) any judgment or award obtained by or against the transferor and not fully satisfied before the transfer date to be enforceable by or, as the case may be, against the transferee; and

(l) for all such incidental, consequential and supplemental orders as are necessary to secure that the agreement or arrangement shall be fully and effectively carried out.

(2) On the hearing of an application under sub-s. (1), the High Court may grant an order in the terms applied for, or with such modifications or variations as the court deems just or proper in the circumstances of the case.

(3) Where the order of the High Court under sub-s. (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law and shall be binding on any person thereby affected regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

(4) The order of the High Court made under sub-s. (1) shall, subject to the directions of the High Court, be published by the transferee in not less than two daily newspapers published in Malaysia and approved by the bank, one of which shall be in the national language and the other in English.

(5) The transferor shall lodge, within thirty days of the making of the order of the High Court under sub-s. (1) an authenticated copy of such order together with an authenticated copy of the agreement or arrangement approved by the minister under s. 49(7) and an authenticated copy of the minister's approval, with:

(a) the registrar of companies; and

(b) the appropriate authority, if any, concerned with the registration or recording of dealings in any movable property any interest in movable property transferred pursuant to the order.

(6) Where an order of the High Court under sub-s. (1) vests any alienated land, or any share or interest in any alienated land, in the transferee – (emphasis by this court)

(a) **the High Court shall**, where such alienated land is in West Malaysia, pursuant to section 420 (2) of the National Land Code, cause a copy of the order to be served on the Registrar of Titles or the Land Administrator, as the case may be **immediately after the making of the order** so that the Registrar of Titles or the Land Administrator, as the case may be, gives effect to the provisions of the said s. 420(2), (3) and (4); (emphasis added)

(b) *where such alienated land is in Sabah, the transferee shall, as soon as practicable after the order has been made, present an authenticated copy of such order to the Registrar for the registration of the vesting of the alienated land* or of the share or interest in alienated land as provided *under the Land Ordinance of Sabah; or* (emphasis added)

(c) **where such alienated land is in Sarawak, the transferee shall**, as soon as practicable after the order has been made, **produce an authenticated copy of such order to the Registrar for the registration of the vesting** or the alienated land or of the share or interest in alienated land, in the transferee, as provided under section 171 of the **Land Code of Sarawak**. (emphasis added).

Section 420 of the NLC states as follows:

(1) Notwithstanding anything in any other written law, **no order of the Court vesting any alienated land**, or any share or interest therein, **in any person or body** shall affect the land, share or interest in question until it has been registered pursuant to this section. (emphasis added)

A (2) The Court shall, accordingly, cause a copy of any such order to be served on the Registrar or, as the case may be, Land Administrator forthwith after the making thereof; and the Registrar or Land Administrator, upon receiving any such copy, shall give effect to the order by making a memorial of the vesting on the register document of title to the land to which, or a share or interest in which, the order relates.

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(3) The Registrar or Land Administrator shall sign and seal every memorial made by him pursuant to this section, and, if able to secure the production of the instrument in question, shall make a copy of the memorial on the issue document of title to the said land or, where the order relates to a lease or a charge, on the duplicate thereof.

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(4) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

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[8] In *Phileoallied Bank (M) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788, a vesting order was made under s. 50(1) of the BAFIA after the plaintiff, *Phileoallied Bank (M) Bhd* as the transferor–bank and Malayan Banking Bhd as the transferee-Bank under the merger exercise had made a joint application at the High Court, Kuala Lumpur by way of an *ex-parte* originating summons. In that case, the defendant's counsel at the outset of the hearing of the foreclosure proceedings raised a preliminary objection that the plaintiff had failed to comply with the terms of the vesting order made in favour of the plaintiff where the registered charge had not been registered in the name of the transferee bank, Malayan Banking Bhd. Learned counsel for the defendant in that case submitted, therefore, the originating summons should be struck out or stayed until the plaintiff had fully complied with the vesting order, in that, the plaintiff cannot proceed with the originating summons unless and until the registered charge has been registered in the name of the transferee-Bank Malayan Banking Bhd, and this must be done by filing the vesting order with the appropriate Land Authority. In reply, the plaintiff's counsel in that case submitted that under s. 50(3) of the BAFIA, the said vesting order supersedes all written laws which include the NLC and the terms of the said vesting order had allowed the plaintiff's originating summons to continue without the necessity of substituting Malayan Banking Bhd – the transferee–Bank, as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd at the appropriate Land Registry. In the circumstances, plaintiff's counsel in that case submitted that the defendant's preliminary objection was without merit. His Lordship Low Hop Bing J. ruled *inter alia* that since s. 420 of the NLC was already

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in existence at the time when s. 50(3) of the BAFIA was enacted, the intention of Parliament is that, the words 'shall have effect accordingly to its term notwithstanding anything in any law or any rules of law' must mean that the vesting order shall take effect despite the provisions contained in s. 420(1) of the NLC and s. 420(1) of the NLC is clearly and unambiguously overridden by s. 50(3) of the BAFIA. In other words, His Lordship said s. 50(3) of the BAFIA prevails over s. 420(1) of the National Land Code. His Lordship further held that the vesting order is all encompassing and s. 50(3) of the BAFIA allows foreclosure proceedings in a charge action to continue without the necessity of substituting Malayan Banking Bhd as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd and relied in the case *Leong Moh Sawmill Co Sdn Bhd (In Liquidation) v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131.

[9] The relevant facts in *Leong Moh Sawmill Co Sdn Bhd (In Liquidation) v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131 for the purpose of the appeal in the instant case, is as follows:

> The appellant, the registered proprietor of two parcels of land charged the lands to the plaintiff/ Standard Chartered Bank (the predecessor bank) to secure a loan granted to him. The appellant then defaulted in the repayment of the loans and the predecessor bank instituted foreclosure proceedings against the appellant. On 4 October 1985, the predecessor bank obtained an order of court to sell the lands by way of public auction. In the meantime, the predecessor bank which was a foreign bank, had transferred and vested all its banking business in Malaysia to Standard Chartered Bank Malaysia Bhd (the successor bank), a separate legal entity incorporated locally, pursuant to a sale and purchase agreement upon complying with all the legal requirements. On 28 April 1994, the High Court, Kuala Lumpur in Originating Summons No: D3-24-88-94 granted a vesting order and *inter alia* fixed 1 July 1994 as the effective date for the transfer of the business of the predecessor bank to the successor bank. Despite the change in the status of the predecessor bank after the transfer date on 1 July 1994, all proceedings in respect of the foreclosure matter continued in the name of the predecessor bank as the plaintiff without any change in the heading and citation and the proclamation of sale upon which the auction was conducted on 13 March 1995 still had the predecessor bank as the plaintiff. The appellant filed an application on 3 April 1995 seeking for the following orders:
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> (1) to set aside the auction held on 13 March 1995 and that the sale of the lands to the second and third respondents be annulled and that the deposits made by them be refunded to them;
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> (2) to set aside the proclamation of sale issued pursuant to the directions for sale;

A (3) a fresh auction sale and fresh directions be given in respect of the same lands; and

(4) all further proceedings arising from the auction held on 13 March 1995 be stayed pending disposal of the application.

B **[10]** On 15 July 1995, His Lordship Abdul Aziz Mohammed J. (as he then was) dismissed the appellant's application with costs. Infact, at the first instance, His Lordship Abdul Aziz Mohammed J. (as he then was) held that the provisions of s. 258(1)(b) and (2)(a) of the NLC have not been breached by the predecessor bank and the fact that the C proclamation of sale maintained the predecessor bank as the plaintiff cannot amount to conduct being improper. Hence, the appeal against that decision to the Court of Appeal. The argument *inter alia* at the Court of Appeal was as follows:

D The main question that was raised by the appellant before the Court of Appeal was since there has been a change in the identity of the chargee ie, from Standard Chartered Bank to Standard Chartered Bank Malaysia Berhad, was there a need for the title in the foreclosure proceedings to be substituted to reflect the identity of the true chargee before the auction could be enforced. It was the contention on behalf of the appellant that the change in the identity of the bank was not a E mere change in name but a new legal entity had been created with the incorporation of the successor bank which has been granted a valid banking licence to operate in Malaysia. Therefore, it was the contention on behalf of the appellant that the failure by the predecessor bank to cite the successor bank as the plaintiff in the proclamation of sale issued pursuant to the directions for sale ordered F on 1 December 1994 constitutes a breach of ss. 258(1)(b) and (2)(a) of the National Land Code 1965 and that breach amounts to an impropriety in the subsequent conduct of the sale so as to entitle the appellant as the charger to nullify the same. It was also submitted that the localised successor bank took over the rights and liabilities of the predecessor bank in Malaysia and this identity of the true chargee G must be reflected by substitution of the name before the auction can be enforced as the predecessor bank continues to operate as a separate legal entity elsewhere internationally, in other words, it is the contention on behalf of the appellant that the proclamation of sale describes the wrong party as the chargee as after 1 July 1994, there H was a need to substitute the successor bank as the plaintiff in the proceedings pertaining to the sale of the lands and relied on the case of *M & J Frozen Food Sdn Bhd v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15 and *Standard Chartered Bank v. Asia Transport Service (M) Sdn Bhd & Ors* [1996] 1 MLJ 157.

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[11] On appeal to the Court of Appeal, Her Ladyship Siti Norma Yaakob JCA (as she then was) in dismissing the appeal with costs and affirming the decision of His Lordship Abdul Aziz Mohammed J. (as he then was) said: A

> The vesting order of 28 April 1994 was such that there is no requirement in law to effect a substitution of the plaintiff. Paragraph 2(d) of the order states that any reference to the predecessor bank in any existing instrument of any nature vesting any title, assets or liability on the predecessor bank shall, without any further act by the predecessor bank, be construed as if the reference has been substituted with a reference to the successor bank with effect from 1 July 1994. Paragraph 2(k) of the vesting order also states that where any right or liability of the predecessor bank is to be transferred to the successor bank, then the latter shall, without any further act of the former, have the same rights, powers and remedies like commencing or defending any legal proceedings including rights and liabilities in respect of any legal proceedings pending before 1 July 1994 by or against the predecessor bank. B C D
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> Likewise, para 2(l) of the vesting order which states that any judgment or award obtained by or against the predecessor bank and which was not complied with or yet to be satisfied shall – with effect from 1 July 1994, and without any further act of the predecessor bank – be enforceable by or against the successor bank as if the latter had become a party to the judgment or award. We consider that the effect of this particular order is that the successor bank is deemed to be a party in all proceedings that were initiated by or commenced against the predecessor bank, and for practical purposes, this means that the successor bank is very much a party to the order of sale obtained on 4 October 1985. E F
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> It was pursuant to the various paragraphs in the vesting order that we have singled out that the trial judge likened the situation of the predecessor bank leaving its shell and the successor bank filling in the space left vacant by the predecessor bank. Thus, the transfer of business was to take place without any further administrative acts to be done by either the predecessor bank or the successor bank. G
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> Thus, by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O. 15 r. 7(2), there may be a substitution of the proper party to continue with the proceedings. However, by virtue of the qualifying words `notwithstanding anything in any law or in any rule of law' appearing in s. 50(3) of the Act, we consider that there is no necessity for a formal order under O. 15 r. 7(2) to regularize the position of the successor bank. If indeed there was any irregularity committed by the predecessor bank, it was merely its failure to withdraw and allow the sale to be conducted by the successor bank. That can be achieved H I

A by the mere production of the vesting order. In any event that omission, we consider, is not the sort of impropriety envisaged by the *Siland*'s case, where the conduct sought to be impugned amounts to a reckless disregard to the interests of an interested party. That cannot be the case here as what is being challenged is not the interest of any party but the wrong use of a name which – by virtue of the particular
B provisions of the vesting order, which we have already averred to, and the provisions of s. 50(3) of the Act – cannot have the effect of rendering the proclamation of sale improper and the subsequent sale annulled.

C **[12]** In *Zubir bin Mustafa v. Tenaga Nasional Bhd & Anor* [2005] 2 CLJ 51, the relevant facts for the purpose of this appeal are as follows:

On 4 September 1984, the appellant, an employee of National Electricity Board (NEB) charged his lands held under PM No: 360 Lot No: 5196, Mukim Alor Malai, Daerah Kota Setar, Kedah to NEB and obtained a
D housing loan facility of RM138,113 which carries 4% interest per annum on monthly rest. On 18 May 1987, the appellant resigned from NEB but however he had defaulted in his repayments towards the said facility. On 1 September 1990, the Electricity Supply (Successor Company) Act 1990 (Act 448) came into force ('The Act'). The Act
E was promulgated to provide for the following:

i. the vesting of property, rights and liabilities of the Board in a company;

ii. to make financial arrangements for that company;

F iii. to provide for matters relating to staff; and

iv. for other matters concerned therewith.

Section 3 of the Act entitled vesting of property, etc, of the NEB in the successor company reads:

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(1) The Minister may, by order published in the Gazette, appoint a transfer date and on such date, all property, rights and liabilities to which the Board was entitled or subject to, immediately before that date shall become by virtue of this section property, rights and liabilities of the successor company.

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(2) For the avoidance of doubt:

(a) any reference to property to which the Board was entitled to, is a reference to land and chooses-in-action of the Board whether situated in Malaysia or elsewhere; and

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(b) any reference to rights and liabilities to which the Board was entitled or subject to, is a reference to rights which the Board is entitled to or, as the case may be, liabilities to which the Board is subject to, whether under the laws of Malaysia or any country outside Malaysia and includes rights and liabilities arising under loans raised.

(3) Every chose-in-action transferred by sub-s (1) to the successor company may, after the transfer date, be sued on, recovered or enforced by the company in its own name and it shall not be necessary for the company or the Board to give notice to the person bound by the chose-in-action of the transfer effected by the subsection.

(4) Every right and liability transferred by sub-section (1) to the successor company may, on and after the transfer date, be sued on, recovered or enforced by or against the company in its own name and it shall not be necessary for the company or the Board to give notice to the person whose right or liability is transferred by this section of such transfer.

(5) In the case of rights and liabilities arising under any loans which vest in the company on the transfer date, the company may enter into such arrangements or agreements over such rights and liabilities with the Government of Malaysia or any third party.

By virtue of a transfer date order 1 September 1990, made by the Minister pursuant s. 3(1) of the Act, all property rights and liabilities to which NEB was entitled to or subject to, were transferred to the 1st respondent, Tenaga National Bhd, the successor company. The Transfer Date Order reads:

Electricity Supply (Successor Company) Act 1990 Transfer Date Order 1990

In exercise of the powers conferred by s. 3(1) of the Electricity Supply (Successor Company) Act 1990, the minister makes the following order:

1. This order may be cited as the Transfer Date Order 1990 and shall come into force of the 1 September 1990.

2. The transfer date on which all property, rights and liabilities to which the National Electricity Board of the States of Malaya was entitled or subject to, are transferred to Tenaga Nasional Bhd, is 1 September 1990.

Made 30 August 1990.

As no payment was made by the appellant pursuant to the notice dated 20 April 1992 issued to the appellant by Tenaga Nasional Bhd pursuant to s. 254 of the National Land Code for the outstanding sum of RM233,397.77 as at 31 January 1992, the Tenaga Nasional Bhd applied for an order of sale on 5 June 1992 from the 2nd respondent, the Land Administrator pursuant to s. 260 of the National Land Code. On 27 January 1993, the 2nd respondent granted the order for sale.

[13] On 6 August 1996, the appellant in that case filed an originating summons and prayed for the following orders:

(i) that the order for sale dated 27 January 1993 be set aside;

(ii) that the public auction of the said property set down for 20 August 1996 be vacated;

(iii) alternatively, a declaration that the order for sale and the public auction is invalid and null and void;

(iv) any other order that the court deems fit; and

(v) costs.

[14] On 15 May 1997, the learned judge of the High Court, Alor Setar dismissed the originating summons. At the High Court, Alor Setar, the appellant's counsel argued that:

(i) that the first respondent has no *locus standi* to apply for an order for sale under s. 260 of the Code as the said property was charged to the Board (NEB) and not to the first respondent;

(ii) that the Transfer Date Order did not automatically vest any right or entitlement under the charge to the first respondent to enable it to apply for an order for sale;

(iii) that the first respondent had not complied with the requirements as to registration of statutory vesting of its interest in the said property under s. 415 of the Code when it applied for the order for sale;

(iv) that the first respondent had registered its interest in the said property only on 5 October 1996 whereas the order for sale was granted on 27 January 1993.

[15] The learned judge of the High Court, Alor Setar *inter alia* was of the view that it is clear that the rights or interest of the Board (NEB) have been vested in the first respondent by the Act and this became effective when the transfer date order was made by the Minister. That being the position, he found that the first respondent has the *locus standi*

to apply for the order for sale notwithstanding there was no registration of the statutory vesting under the Code in relation to the charge of the said property and as such dismissed the appellant's originating summons with costs.

Hence, the appeal to the Court of Appeal.

[16] At the Court of Appeal, the appellant's counsel in *Zubir Bin Mustafa v. Tenaga Nasional Bhd & Anor* submitted as follows:

(a) that the learned judge erred in deciding that the first respondent was not required to register the statutory vesting in order to commence proceedings for the order for sale under the Code;

(b) that for the first respondent to avail themselves of such remedy; it must be a registered chargee; as it had not registered the statutory vesting at the time the order for sale applied for, it had no *locus standi* to commence any proceedings under the Code;

(c) that although the Act vests all rights and liabilities of the Board to the first respondent, the latter must comply with the Code if it sought to obtain any remedy thereunder.

[17] By a majority decision (His Lordship Abdul Kadir Sulaiman JCA (as he then was) and Mohd Ghazali JCA in *Zubir Mustafa v. Tenaga Nasional Bhd & Anor inter alia* said:

> We are of the view that the observations of the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* equally apply to applications for order of sale made pursuant to s. 263(1) of the Code. The appellant in the instant case has applied for the order for sale to be set aside but he has not shown any cause to the contrary within the contemplation of s. 263(1) of the Code. As such we are of the view that under the circumstances the second respondent was obliged to make the order for sale. The fact that the first respondent has chosen not to register its interest in the said property pursuant to s. 415 of the Code was insufficient to defeat its right under the charge to apply for an order for sale. The second respondent has granted the order for sale upon the application of the first respondent and rightly so. In the exercise of his powers conferred by s. 3(1) of the Act, the Minister ordered that all property, rights and liabilities to which the Board was entitled or subject to be transferred to the first respondent. The rights of the Board as chargee in relation to the said property has been transferred to the first respondent by virtue of the Transfer Date Order and as from 1 September 1990, the first respondent can enforce its rights as chargee including applying for an order for sale once there has been default on the part of the chargor, ie the appellant. The Act has clearly vested in the first respondent all rights under the charge. The first respondent may apply pursuant to s. 415 of the Code to register its goodself as chargee in place of the Board and the evidence showed it

A has done so on 5 October 1996. The appellant complained that the first respondent did so only after the order for sale was granted but then we cannot see how that can be fatal. From our reading of the Act and the Code, we would agree with the learned judge that registration of a statutory vesting is not a mandatory requirement.

B Section 414 of the Code defines statutory vesting. It is a vesting effected by any written law and such vesting takes effect irrespective of whether or not any instrument of transfer or other instrument is required to be presented to the Registrar in order to give effect to such vesting, or which has the effect of vesting in the transferee any other right or entitlement whatsoever in relation to any land which was C the right or entitlement of the transferor. All rights of the Board under the charge were automatically transferred to the first respondent with effect from 1 September 1990. Such rights include the rights of the Board as a registered chargee. By operation of law, on 1 September 1990 the first respondent became the registered chargee in place of the Board. As the first respondent has been vested with the rights as a D registered chargee, we cannot see how it can be argued that the first respondent did not have the *locus standi* when it made the application for order for sale. The rights of the Board under the charge has been transferred to the first respondent. The Board is no longer the chargee and the first respondent has stepped into its shoes by virtue of the Act and the Transfer Date Order. The charge over the said property E remains a registered charge. There was no fresh charge to be executed.

In the instant case, it involved statutory vesting and hence the provisions of s. 415 of the Code would apply. That section does not make it mandatory for that transfer of rights under the charge from F the Board to the 1st respondent to be registered. Further, there is no requirement of a fresh charge to be executed.

For these reasons, we would dismiss this appeal with costs and order that the deposit be paid to the first and second respondents towards the account of taxed costs. G

[18] In the instant case, the sole issue is whether the plaintiff has the *locus standi* to enforce both the registered charges against the defendant without causing a copy of the said vesting order to be served on the Registrar of Titles as required under s. 50(6) of the BAFIA so as to H disclose to the authority that the plaintiff is the transferee Bank as granted by the High Court, Kuala Lumpur and to give effect to s. 420(1) of the NLC. In order to answer the issue posed, it is important to consider the terms of the said vesting order, the law and the grounds relied on by learned counsel for the defendant in his I application being O. 18 r. 19(a) of the RHC 1980 to strike out the amended originating summons (encl. 6) filed by the plaintiff. This court

is of the view that the ground relied on and contended by learned counsel for the defendant that the amended originating summons does not disclose a reasonable cause of action is unsound in law and ought to be rejected outright. In the instant case, the plaintiff had obtained all the rights of the transferor Bank by virtue of the said vesting order to commence foreclosure proceedings against the defendant on the registered charges as the transferee–successor/bank as the charged properties have been vested in the plaintiff. Paragraph (k) of the said vesting order states that:

> (k) di dalam kes dimana apa-apa hak atau liabiliti-liabiliti Pemindah yang berkenaan dengan Perniagaan tersebut dipindahkan kepada Penerima Pindahan, Penerima Pindahan hendaklah mempunyai hak, kuasa dan remedi yang sama (dan khususnya hak kuasa dan kuasa yang sama tentang pengambilan atau penolakan prosiding undang-undang atau pembuatan atau penolakan permohonan kepada mana-mana pihak berkuasa) bagi memastikan, melindungi atau menguatkuasakan hak itu atau menolak liabiliti-liabiliti itu seolah-olah ia telah pada setiap masa menjadi hak atau liabiliti-liabiliti Penerima Pindahan, termasuk hak-hak atau liabiliti-liabiliti yang berkenaan dengan apa-apa prosiding undang-undang atau permohonan kepada mana-mana pihak berkuasa belum selesai sebelum tarikh permohonan oleh atau terhadap Pemindah;

[19] Accordingly, the plaintiff who is clothed with the said vesting order has the legal capacity to commence to enforce the statutory remedy as provided under s. 256 of the NLC by filing this originating summons on 24 December 2001 for a judicial sale of the said properties (after the effective date on 1 January 2001 which had transferred the the business of the predecessor bank (Oriental Bank Berhad) to the successor bank, the plaintiff (EON Bank Berhad).

[20] In the instant case, two sets of first legal charge was executed by the defendant in favour of the predecessor bank on 10 June 1997. The charge over the seventeen pieces of land was registered on 11 June 1997. The other charge over twelve pieces of land charge it was registered on 23 June 1997 for overdraft facilities to the extent of RM1,650,000 and for a term loan of RM2,750,000 respectively. As there was a breach of the term of the facilities agreement dated 10 June 1997 and the charge annexure, Statutory Form 16D of the NLC was served on the defendant. Subsequently, this originating summons was filed by the plaintiff to obtain the judicial sale and followed by the amended originating summons.

[21] On the facts as disclosed by the relevant and admissible documents, this court is of the view that the application dated 24 September 2002 (encl. 9) by the defendant to strike out the amended

originating summons (encl. 6) on the ground it disclosed no cause of action cannot be sustained. The law on judicial sale by way of foreclosure proceedings is crystal clear that the order for sale granted to a chargee upon an application under s. 256 of the NLC does not constitute a judgement debt and the order to be granted is pursuant to the chargee's statutory remedy under NLC. (See *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332). On the other hand, if the defendant or the chargor wishes to oppose the application of the order for sale, he or she has to show the existence of cause to the contrary as provided under s. 256(3) of the NLC and this is done by filing an affidavit in reply to the originating summons and the affidavit in support.

Section 256(3) of the NLC states as follows:

> On any such application, the Court shall order the sale of the land or lease to which the charge relates **unless it is satisfied of the existence of cause to the contrary**. [emphasis added]

[22] This court also finds that the defendant had failed to show that the ground raised to strike out the amended originating summons is within any of the grounds considered under the cause to the contrary to defeat the order of sale sought by the plaintiff. (See *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457, *Kuala Lumpur Finance Bhd v. Yap Poh Khian (Teo Sik Eng & Anor, Interveners)* [1992] 1 MLJ 472, *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, *Bank Of Commerce (M) Bhd v. Selangor Frits & Glazes Sdn Bhd* [1998] 4 CLJ 899, *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144, *Multi-purpose Bank Bhd v. Maimoon Bte Abdul Razak* [1999] 3 CLJ 21, *Phuman Singh v. Kho Kwang Choon* [1965] 2 MLJ 189, *Associate Finance Corporation Ltd v. Poomani* [1972] 1 MLJ 117, *OCBC Bank (M) Bhd v. Astano Electric Sdn Bhd* [1999] 8 CLJ 369, *Malayan United Finance Berhad lwn. Tan Ah Moi @ Tan Nyar Pong (F) & Satu Lagi* [1993] 2 CLJ 427, *KSM Insuran Bhd lwn. Amanah Chase Merchant Bank Berhad* [1992] 1 MLJ 651, *Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Snd Bhd* [1992] 4 CLJ 2212, *Oriental Bank Bhd v. Mohinder Pal Kaur a/p Tirlok Singh* [1996] 1 MLJ 788, *Phileoallied Bank (Malaysia) Berhad (Yang Mengambil Alih Semua Aset Dan Liabiliti The Cooperative Central Bank Berhad) v. Narendran s/o Thambimuthu* [1999] 8 CLJ 394, *OCBC Bank (M) Berhad v. Lean Seng Pottery Factory Sdn Bhd* [1999] 2 MLJ 402, *Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997, *United Malayan Banking Corp Bhd v. Chong Bun Sun And Another Application* [1994] 2 CLJ 673).

[23] In the instant case, the defendant did not file an affidavit in reply to show the existence of cause to the contrary or raised any preliminary objection. The defendant has taken the plaintiff on a long and expensive

route by filing an application to strike out the amended originating summons under O. 18 r. 19(1)(a) RHC 1980 which required various procedural steps to be taken before the application to strike out the originating summons is heard before the registrar of the High Court and then the notice of appeal to the judge in chambers is heard by the judge. In fact, it was open to the defendant to have raised the non-compliance of the said statutory provisions by way of preliminary objection at the outset of the hearing of the application (encl. 4) to amend the originating summons which was heard before the deputy registrar of the High Court on 8 July 2002 or at the outset of the hearing of the foreclosure proceedings when the matter is heard before the judge for the proceeding to be stayed until such time the plaintiff has complied with the said statutory obligation. Instead, the defendant chose to invoke O. 18 r. 19(1)(a) of the RHC 1980 to strike out the amended originating summons as it disclosed no reasonable cause of action which is an extreme and drastic step to proceed for the reason of non-compliance of the registration of the said vesting order. Justice would not be served by allowing the defendant's application to strike out the amended originating summons on technicalities. The application to strike out the amended originating summons was heard by the registrar of the High Court who had dismissed the said application. The defendant being dissatisfied with the decision of the registrar had filed the notice of appeal to the judge in chambers as provided under O. 56 of the RHC 1980.

Order 56 of the Rules of the High Court 1980 states as follows:

Order 56. Appeals from Registrar and Judge.

Rule 1. Appeals from certain decisions of Registrar to Judge in Chambers. (O. 56 r. 1)

(1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

(2) The appeal shall be brought be serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in From 114 to attend before the Judge on a day specified in the notice.

(3) Unless the Court otherwise orders, the notice must be issued within 10 days after the judgment, order or decision appealed against was given or made, and must be served not later than 5 days before the date fixed for the hearing of the appeal.

(3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:

A a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the
B decision of the Registrar.

(4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

C Rule 2. Appeal from Judge. (O. 56 r. 2)

Subject to the provisions of section 68 of the Act, a party may appeal against any judgment, order or decision made by a Judge in Chambers.

[24] Be that as it may, it is also important to distinguish a case where
D the doctrine of subrogation applies as in the case in *Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493. In that case, the successor - bank had by an order of court subrogated to the rights of the predecessor – bank. Accordingly, there must be strict compliance and adherence to the principle of registration as a fresh
E charge has been issued in favour of successor – bank. In order to enforce the fresh charge by way of foreclosure proceeding, pursuant to the NLC which was executed in favour of successor – bank, the charge has to be registered under the NLC unless the chargee relies on remedy on common law or sue to recover as a debt. Therefore, the facts in the instant case has to be distinguished when compared to the facts in
F *Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd* where it involved subrogation to the rights of the predecessor – Bank whereas in the instant case, the right of the plaintiff have been vested in the plaintiff by the said vesting order.

G **[25]** The defendant's application to strike out the amended originating summons is on the ground that it does not disclose reasonable cause of action; O. 18 r. 19(1)(a) of the RHC 1980 states:

1. (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of
H any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

I (2) No evidence shall be admissible on an application under para. (1)(a).

[26] The power to strike out pleadings or claim is exercised by the court by summary process at an early stage of the proceedings and if allowed it disposes of proceedings without a trial or full hearing. The powers are conferred by rules of court and exercisable under the inherent jurisdiction of the court and it is a discretionary jurisdiction. It is an established principle that the parties will not lightly "be driven from the seat of judgment". In *Dyson v. A-G* [1911] 1 KB 410 at p. 419, Fletcher Moulton LJ said:

> To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" and this discretion will be exercised with the greatest care and circumspection and only in the clearest case or where the cause of action is obviously and almost incontestably bad." (See (1) *Ibrahim Bin Mohamad v. Ketua Polis Daerah Johor Bahru* [1996] 5 MLJ 15 at p. 21(2) *Richland Trade & Development Sdn. Bhd & Ors v. United Malayan Banking Corp Bhd* [1996] 4 MLJ 233).

[27] In other words, it is to be considered that the power to dismiss or strike out the pleadings or action summarily is a drastic power and it should be exercised with the utmost caution. (see *Tractors Malaysia Bhd v. Tio Chee Hi*ng [1975] 2 MLJ 1). Striking out pleadings for having disclosed no reasonable cause of action is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief which he asks for. (See (1) *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor And Another Appeal* [1998] 3 CLJ 253 (2) *Abdul Rahim bin Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457).

[28] A summary procedure under this rule is a drastic one and should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. (See *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886). The claim or pleadings must be hopeless, baseless or without foundation in law or in equity, or must be an abuse of the process of the court before they can be struck out under this rule. (See (1) *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, (2) *Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmill (M) Sdn Bhd & Ors (No 2)* [1997] 2 CLJ 406, (3) *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 5 MLJ 313 (4) *Pengiran Othman Shah Bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (Formerly Known As Lipkland (Sabah) Sdn Bhd & Ors* [1996] 1 CLJ 257, (5) *Tan Keat Seng Kitson v. Kerajaan Malaysia* [1996] 2 CLJ 722). In *Lim Kit Siang v. Pemangku Ketua Polis Daerah, Butterworth & Ors* [1988] 2 MLJ 648 His Lordship Edgar Joseph Jr J ((as he then was) at p. 650 said:

A reasonable cause of action therefore means a cause of action with some chance of success where only the allegations in the pleading are considered. (per Lord Pearson in *Drummond – Jackson v. British Medical Association* [1970] 1 WLR 1238).

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in the Supreme Court Practice 1970 under the heading 'Exercise of Powers under this Rule' in the notes under O. 18 r. 19. One which might be added is *Nagle v. Feilden*. Reference has been made to four recent cases: *Rondel v. Wosley*, *Wiseman v. Norneman*, *Roy v. Prior* and *Schmidt v. Secretary of State for Home Affairs*. In each of these cases there was an important question of principle involved, and the hearing of the application under RSC O. 18. r. 19, was much longer and more elaborate than is usual, but the final decision was that the alleged cause of action was clearly unsustainable, and so the statement of claim disclose no reasonable cause of action and was ordered to be struck out. There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, by the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the courts to adopt this unusual procedural method in special cases where it seen to be advantageous. But I do not think that there has been or should be any general change in the practice with regard to applications under the rule.

In my opinion the traditional and hitherto accepted view – that the power should only be used in plain and obvious cases – is correct according to evident intention of the rule for several reasons. First, there is in r. 19(a) the expression 'reasonable cause of action', to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd v. Wilkinson*, Heywood and Clark Ltd. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r. 19(2) only the allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v. Feilden* Danckerts L.J. said at p. 648:

> The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court.

In the same judgment, His Lordship Edgar Joseph Jr. J (as he then was) said:

> It is only in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court and unarguable, that the summary remedy will be applied (per Dauckwerts and Salmon L.J.J. in *Nagke v. Feildon* [1966] 2 Q.B. 633 at p. 648, 651)
>
> The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court.

[29] In *Thynne v. Thynne* [1955] 2 All ER 377, in the course of delivering the judgment where in dealing with the inherent jurisdiction of the court, Singleton LJ said:

> It is a power, or a right, which ought not to be cut down. It enables the court, in a proper case to put right something which is incorrectly stated and to keep its rewards in line with the real position. It is discretionary in the court, and it ought not to be used if it can cause injustice to anyone, or if in any sense the exercise of it can offend against the public weal.

[30] If an action contains a point of law which requires serious argument, it is not appropriate to strike it out. (See (1) *Oh Thevesa v. Sia Hok Chai* [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148, (2) *Liu, Ren-shuenn v. Lee, Chiu Pin* [1999] 2 CLJ 35, (3) *Chung Khiaw Bank Ltd v. Multidev Sdn Bhd & Ors* [1979] 1 MLJ 93, (4) *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 2 MLJ 240 (5) *Ban Guan Sendirian Bhd v. United Malaysian Steel Mills Berhad* [1977] 2 MLJ 52.)

[31] In the instant case, failure to have the said vesting order registered does not in the considered view of this court go to the root of the chargee's right to enforce the statutory right to such an extent that it vitiates the entire proceedings filed by the plaintiff who have stepped into the shoes of the registered chargees so as to strike out the amended originating summons as disclosing no reasonable cause of action against the defendant. As has been clearly spelt out in sub-r. 2 of O. 18 r. 19 of the Rules of the High Court 1980 no evidence or affidavit evidence is admissible on an application to strike out any pleading which includes an originating summons for having disclosed no reasonable cause of action. (See (1) *Zakaria Bin Mohamed Esa v. Dato Abdul Aziz Bin Ahmad & Ors* [1985] 2 MLJ 222, (2) *S Manickam & Ors v. Ismail Bin Mohamad & Ors* [1997] 2 MLJ 90, (3) *Ibrahim Bin Mohamad v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 5 MLJ 15, (4) *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ

716 (5) *Shaik Zolkaffily Bin Shaik Natar & Ors (Sued As Trustees Of The Estate Of Sheikh Eusoff Bin Sheik Latiff, Deceased) v. Majlis Agama Islam Pulau Pinang Dan Seberang Perai* [1997] 4 CLJ 70 (6) *Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn Bhd* [1996] 4 MLJ 489 (7) *Hii Teng Tuong Alphonsus v. Lok Min Wah & Ors* [1995] 4 MLJ 259 (8) *Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607, (9) *Peck v. Russell* [1923] 4 JMSLR 32, (10) *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 MLJ 226). Nevertheless, in the instant case, the application to strike out the amended originating summons for having disclosed no reasonable cause of action under O. 18 r. 19(1)(a), it is arguable that this court is able to consider the affidavit which has already been filed in support of the originating summons. Therefore, affidavit evidence (encl. 2) which has been filed in support of the originating summons may not be excluded and this court has to read the affidavit evidence in support of the originating summons in order to consider the terms and requirement of the said vesting order. (See *Re Cainess Knapman v. Servian* [1978] 2 All ER 1).

[32] Where the pleadings are defective and the opposing party seeks to strike out these pleadings, the court ought not to act summarily if an amendment can correct the defect. (See *Kuala Lumpur Finance Bhd v. KGV & Associates Sdn Bhd* [1995] 1 CLJ 519, *Lim Weow Lim Neu v. Perwira Habib Bank Malaysia Bhd* [2001] 2 AMR 1307). Even in cases where a pleading is challenged with respect to the authority of the issuer, the court should grant a stay of proceedings to allow the company to determine whether the director has the authority of the board to commence the action and, where appropriate, to ratify any defects of authority which may arise. (See *Pilot Cargo (M) Sdn Bhd & Anor v. Adinas Tours & Travel Sdn Bhd & 2 Ors* [2002] 6 CLJ 442).

[33] In the instant case, although the identity of the party has changed, the nature of the statutory remedy available under the NLC is the same and has not changed as it is the same remedy which is being asserted by the plaintiffs. This remedy is made clear by para. (k) of the said vesting order. The originating summons is filed on the same first legal charges which has been registered. There is no question of a new statutory remedy or a new charge being asserted, even though in the particular circumstances the statutory remedy has been filed by the plaintiff who is the successor Bank. The essential point is that, there is no new charge to register as the enforcement by the plaintiff is on the existing registered charges. (See *Yorkshire Regional Health Authority v. Fairclough Building Ltd. And Anor* [1996] 1 All ER 519 at 529.)

[34] In *Yorkshire Regional Health Authority v. Fairclough Building Ltd. And Anor* [1996] 1 All ER 519, Evan LJ said at p. 529: A

> Although the identity of the party changes, the nature of the claim does not. It is, in legal terms, the same cause of action as it was before. There is no question of a new claim or cause of action being asserted, even though in the particular circumstances the claim is being made by a different person. B
>
> It is equally obvious that if the so called literal construction were to compel the conclusion for which the appellants contend, then it would be as the result of an unfortunate oversight by Parliament and the draftsman of the rules. C

[35] Among the legal requirements for the merger, an important requirement, is that, the court must approve the terms of the merger which has in fact been approved by granting the said vesting order. (See *National Bank Of Greece And Athens Sa v. Metliss* [197] 3 All ER 608 at p. 616.) In a case, where the transmission of interest has occurred before the writ was issued by the transferor, and the transferee was not named as plaintiff in the proceedings even though the transferor has ceased to exist by the terms of the merger the misnomer can *prima facie* be cured so as to substitute the transferee as plaintiff (see *The Sardinia Sulcis* [1991] 1 Lloyd's Rep. 201). D E

[36] It is the considered view of this court that in any event, the requirement to cause to serve the said vesting order on the Registrar of Titles is not a prerequisite before the foreclosure proceedings is filed or order for sale is granted. Nevertheless, even if it has to be served, it is still curable and this court has the inherent jurisdiction to meet the justice of the case to direct the plaintiff or the registrar of the High Court to now cause to serve the said vesting order on the Register of Titles before taking any further steps in the proceedings ie, if there is in fact a prerequisite in law to register the said vesting order before the order for sale is granted. Nevertheless, failure to serve the vesting order on the facts in the instant case did not vitiate the proceedings for an order for sale to be granted or run foul of the torrens system as submitted by learned counsel for the defendant. F G

[37] It is also important to restate that the chargee who applies for an order for sale under s. 256 of the National Land Code does not commence an action and the statutory right on the charge and the order for sale is independent of any other causes of action which the chargee may have against the chargor under the charge. (See *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 and *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15). Section 340(1) of H I

A the NLC confers indefeasible interest in the lands on the chargee upon the registration of the charge unless it is made defeasible by s. 340(2) in case of fraud, forgery or illegality which is not applicable in the instant case.

B **[38]** The plaintiff's claim against the defendant is in the exercise of the statutory remedy under the registered charge in which the plaintiff has by virtue of the said vesting order stepped into the shoe of the chargee (see *Malaysian International Merchant Bankers v. Dhanoa Sdn Bhd* [1988] 1 MLJ 257 at p. 258; *American International Assurance Co. Ltd v. Union Builders Malaysia Sdn Bhd* [1973] 1 MLJ 95). This court is of the C considered view that the indefeasibility of the chargee's interest is not affected or extinguished by the merger exercise which has in fact vested the chargee's interest and rights in favour of the plaintiff by virtue of the said vesting order notwithstanding that the vesting order has not been forwarded to the Registrar of Titles. (See *Dato' Fathi bin Haji* D *Ahmad v. Standard Chartered Bank Malaysia Bhd* [2006] 1 CLJ 273). In any event, what is important is that no bona fide purchaser for value can claim or be allowed to prevail over that existing registered charge. (see *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81, *Perwira Habib Bank (M) Bank Bumiputra (M) Bhd* [1988] 3 MLJ E 54, *Oh Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159).

[39] The plaintiffs have a right in personam against the defendant by virtue of the registered charge which entitles them to enforce the statutory remedy, against the chargor defendant. Therefore, this court is of the considered view that there must be a distinction drawn between F rights in rem or personal rights and rights in rem or real rights. In other words, a different situation would arise where a purchaser of a land who has performed all his obligations pursuant to a valid sale and purchase agreement acquires a right to the land as against the vendor personally but not good against the world as a whole unless such time G the conveyance is registered in accordance with the NLC. In those circumstances, the conception of indefeasibility being central in the system of land registration and '… the cardinal principal of the statute is that registration is everything …' is relevant. (See *Fels v. Knowles* [1906] 26 NZLR 604 at p. 620).

H **[40]** Torrens law is basically a system of conveyancing; it does not abrogate the principle of equity. In the instant case, there is nothing to convey to the plaintiff as envisaged under the Torrens system. Accordingly, the failure or omission to have the vesting order forwarded to the Registrar of Titles does not interfere with the Torrens system of I conveyancing or defeat the indefeasible interest or the rights of the third parties who have not intervened. (See *Taitapu Gold Estates v. Prouse*

[1916] NZLR 825; *Holidays Sdn Bhd and Wilkins v. Kannamal* [1951] MLJ 99; *Karuppiah Chettiar v. Subramaniam* [1971] 32 MLJ 116; *Loke Yes v. Port Swettenham Rubber Co.* [1913] AC 491; *Gondola Motor Credit Sdn Bhd v. Almurusi* [1992] 4 CLJ 2212). A

[41] In *Wilkins v. Kannamal* [1951] MLJ 99, Taylor J observed: B

> The Torrens law is a system of conveyancing, it does not abrogate the principle of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects

[42] Lord Russell of Killowen in *Oh Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159 observed at p. 164: C

> the Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience

D

[43] In *Gibbs v. Messe*r [1891] A.C 248, the Privy Council described the Torrens system as follows:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of this author's title.

E F

[44] It is important to mention that learned counsel for the defendant, Mr. Chee Weng Weng is his able argument, strived hard to persuade this court that this court cannot depart from the Torrens system ie, the register should be a mirror of title and that the registration of the said vesting order was a prerequisite as expressly required under s. 420 of the NLC. He submitted that notwithstanding anything in any law or in any rule of law must necessarily refer to the NLC. Therefore, learned counsel Mr. Chee Weng Weng has submitted the amended originating summons should be struck out as not disclosing reasonable cause of action. However, this court is of the considered view that ownership in the land still remains in the registered owner (chargor) unlike an instrument of transfer which passes title or interest to a transferee. Therefore, it is important to draw a distinction between an instrument of transfer under the Torrents system and a registered charge which does not change the status of a registered proprietor and the chargee merely enforces the statutory remedy under the NLC. (See *Yorkshire* G H I

Regional Health Authority v. Fairclough Building Ltd. And Anor [1996] 1 All ER 519 at 529.) In the instant case, as stated above, the said vesting order permits the plaintiff to enforce the statutory remedy over the registered charge as from the transfer date 1 January 2001.

[45] The principle of indefeasibility of title under the Torrens system should not be mixed up or equated with the requirement of having to register a vesting order as provided under s. 50 of the BAFIA and to be read with s. 420 of the NLC. In the instant case, the merger exercise which was carried out pursuant to the said vesting order in favour of the plaintiff did not create a new charge or remedy but it is an existing remedy which is available under the existing registered charge against the defendant who is the chargor. It is not against a new proposed chargor or registered owner of the land. Instruments of dealing such as charges upon its registration, do not pass titles to the land to the chargee. Proprietorship still vests in the chargor and the charge executed in favour of the predecessor-bank still remains registered.

[46] On the other hand, it is also important to state that the omission to register the said vesting order is curable so long as no real prejudice will result to the defendant and further, the defendant has not shown any prejudice having been caused. There is also no fundamental breach which goes to the root of the charge to such an extent to vitiate the foreclosure proceedings filed by the plaintiff. If at all the said vesting order is required to be registered or served on the registrar of title, it may be remedied by presently causing a copy of the said vesting order to be served on the registrar of title. As the defendant is unable to show that it had in fact been prejudiced by this non-registration, this court finds there is no merit in this application to strike out the amended originating summons. Failure to register or serve the said vesting order under the merger exercise to enforce the registered charge can never treated as a breach of the indefeasibility principle or as provided under s. 304(2) of the NLC. (See *Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd* [1992] 4 CLJ 2212).

[47] In *R v. The Committee of Lloyd's ex parte Moran* Q.B.D 1983 Times, 24 June Mustill J. said:

> A statute or contract cannot be interpreted according to its literal meaning without testing this meaning against the practical outcome of giving effect to it. If the result does not make sense, the interpretation must be rejected". (See also *Land Law in Malaysia cases and Commentary* Second Edition by Teo Keang Sood and Khaw Lake Tee; *Sale and Purchase of Real Property in Malaysia*.)

[48] If the legislature had been minded to impose upon the plaintiff, the transferee - bank to make the registration of the said vesting order mandatory to the effect that any enforcement of the existing registered charge is depended upon or subject to the registration of the said vesting order it would have expressly prescribed it as it has for the cases in Sabah and Sarawak pursuant to sub-s (6)(b), (c) of s. 50 of the BAFIA or in the other situations as imposed in sub-s. 4 of s. 50 of the BAFIA. This court is unable to find any sufficient ground for holding otherwise but to point out there is a distinction between the two situations in Sabah/Sarawak and Malaya.

[49] The issue of whether O. 18 r. 19(1)(a) of the RHC 1980 could be invoked to strike out a foreclosure proceedings filed under s. 256 of the NLC was not addressed or canvassed by both parties until it was raised by this court for both parties to address the court since the statutory defence provided under s. 256(3) of the NLC is available to the defendant and the defendant could have just filed an affidavit in reply to show there exist a cause to the contrary. (See (1) *LYN Country Sdn Bhd v. Eic Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828, (2) *Chong Chee Yan v. Golden Dragon Garden Sdn Bhd* [1999] 3 CLJ 151, (3) *Dato Mohamed Shamsuddin v. Attorney-general Of Hongkong* [1986] 2 MLJ 112, (4) *Syed Ahamed Abdul Salam & Ors v. Naina Mohamed & Sons (Penang) Sdn Bhd* [1998] 3 CLJ Supp 81, (5) *Public Bank Bhd lwn. Search Realty (M) Sdn Bhd* [2001] 3 MLJ 119, (6) *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634 CA). Under s. 256 of the NLC, the court must order the sale of the land to which the charge relates, in other words, the order of sale is mandatory unless the court is satisfied of the existence of cause to the contrary. In the instant case, this court is of the view that the ground raised on behalf of the defendant to strike out the amended originating summons that it does not disclose no reasonable cause of action does not come within the category cause to the contrary.

[50] Be that as it may, even assuming that the registration of the said vesting order is mandatory to enforce the registered charge and there is non compliance of paragraph (r) of the said vesting order to be read with sub. s. (6) of s. 50 of the BAFIA and s. 420(1) NLC as contended by learned counsel for the defendant, it is the considered view of this court that mere failure to comply with those requirement is not fatal and does not affect the proceedings or the judicial order to be made on the charges as first, the registered charge can still be enforced without the registration of the said vesting order which has been granted in favour of the plaintiff as stated in para. (k) of the said vesting order. Secondly, the transferee/successor – bank is already named as the plaintiff in the Originating Summons and the amended Originating Summons unlike in the case *Leong Moh Sawmill Co Sdn Bhd (In*

Liquidation) v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 where the successor bank was not even named as a party in the proclamation of sale. Thirdly, the charge has been registered. Fourthly, the defendant has also failed to show how the failure to register or serve the said vesting order on the Registrar of Titles has prejudiced the defendant or has occasioned a miscarriage of justice. In any event, the non-compliance with that procedural requirement should not be treated as invalidating any action or other proceeding, steps or statutory remedy taken therein by the plaintiff unless it has occasioned a substantial miscarriage of justice or has caused prejudice to the defendant which is not curable. (See *Mokhtar Bin Amin v. Mohamed Mokhtar Bin Omar* [2001] 4 CLJ 489 and followed in *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532).

[51] In *Johannes Koplan v. Aw Chen* [1970] 1 MLJ 220, Ong C.J said:

> Legal technicalities which stand in the way of any aggrieved person seeking and obtaining his remedy in court should not be allowed to prevail so as to frustrate any just claim.

[52] In *Riches v. Director Of Public Prosecutions* [1973] 2 All ER 935

> The object of RSC Ord 18. r. 19 is to ensure that defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. On the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute-barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and wastes money; and even more useless and time-consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained. I seems to me that when that situation arise the comments of Lord Blackburn in *Metropolitan Bank v. Poole* are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The White Book, having called attention to that statement by Lord Blackburn, goes on to say that the object is `to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation'. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackles will fall to the ground the moment the uncontested facts appear; and that is just this case.

[53] In *Tan Chwee Geok & Anor v. Khaw Yen-yen & Anor* [1975] 2 MLJ 188 at p. 193, Ali FCJ said: A

> The general principle, I think, is that rights of parties is an action are not to be defeated by technical objections.

[54] In *Boustead Trading [1985] Sdn Bhd v. Arab Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283 at p. 293, Gopal Sri Ram JCA said: B

> ... After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case ..."(See *United Malayan Banking corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31.)

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[55] In *Re Helsby; Ex P The Trustee* [1994] 1 QB 742, Lord Halsbury said at p. 744:

> no doubt, as a general rule, if there is a real question to be argued, it is better than it should be argued than the appeal should be disposed off upon a technical objection.

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[56] In *Lim Cheng v. Sandanam* [1962] 28 MLJ 254, the respondent's counsel raised a preliminary objection that the appeal record did not include 'the decision' under the repealed O. r. 3(1)(d) of the Subordinate Courts Rules 1950 and the appeal record was not complete and therefore the appeal record should be dismissed. He further contended that the appeal should be dismissed on another ground, namely, that the decision given by the lower court was not extracted by the appellant. His Lordship Hashim J. said that 'this is a matter of procedure and the appeal should not be dismissed for a technical flaw in the procedure'. E

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[57] In *Imtiaz Ahmad v. Ghulam Ali* PLD [1963] SC 382 at p. 400, Kaikaus J. said:

> ... I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.

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[58] In *Harkness v. Bell's Asbestos And Engineering Ltd* [1967] 2 QB 729 at pp. 735-736, Lord Denning MR observed that:

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> Every omission or mistake in practice or procedure is hence forward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that

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> it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation

[59] In *Idris bin Haji Salleh v. Federal Auto Holdings Bhd* [1979] 2 MLJ 141 at p. 143, His Lordship Syed Agil Barakbah J. (as His Lordship then was) said:

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> The courts in a case … prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application …

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[60] In *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, His Lordship Gopal Sri Ram JCA in delivering the judgment of the Federal Court said:

> That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of the court and of practice are created to facilitate the attainment of justice, not its obstruction.

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[61] In *Arbuthnott v. Fagan, Deeny v. Gooda Walker Ltd* [1993] Times, 20 October, [1993] Sir Thomas Bingham MR speaking for the Court of Appeal said:

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> Court will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis".(See *Industrie Chimiche Italia Centrale and another v. Alexander Tsaviliris & Sous Maritime Co. and Others* [1996] 1 All E.R at p.124-125).

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[62] In the instant case, the defendant has also applied to strike out the amended originating summons pursuant to O. 92 r. 4 of the RHC 1980 states as follows:

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Inherent powers of the Court: A

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court

[63] This court is of the view that the application of the inherent B jurisdiction of the court as provided under O. 92 r. 4 RHC 1980 does not assist the defendant as first, there is an express rule which is applied and relied by the defendant being O. 18 r. 19(1)(a) of the Rules of the High Court 1980 to strike out the amended originating summons, secondly, the defendant is provided with a statutory defence under C s. 256(3) of the National Land Code to dispute or oppose the statutory remedy of the plaintiff pursuant to the registered charge by showing that there is in existence cause to the contrary as laid out in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1999] 1 MLJ 99 which the defendant has failed to do so and thirdly, it is a discretionary exercise. On the facts and D circumstances in the instant case, the inherent jurisdiction of the court ought not to be applied against the plaintiff. Instead O. 92 r. 4 of the RHC 1980 should be invoked in favour of the plaintiff in order to prevent injustice to the plaintiff as to grant the defendant's application would obviously cause injustice to the plaintiff who will be prevented or E shut out from enforcing the registered charge to recover loans granted to the defendant.

[64] It is important to reiterate or restate that it is settled law that the chargee – Bank who filed an application for an order for sale in foreclosure proceedings under s. 256 of the NLC does not commence F an action or suit. The chargee merely enforces his statutory right and seeks the leave of the court to exercise his statutory right. In other words, the plaintiff does not commence or has commenced any suit against the defendant but has merely exercised its statutory right to enforce the charge which has been registered. Therefore, it is G questionable whether the defendant could circumvent that statutory defence as provided in s. 256(3) of the NLC which the defendant had failed to apply and instead invoked O. 18 r. 19(1)(a) of the RHC 1980 by the side door to oppose the order of sale. Accordingly, this court must order the sale of the land unless the court is satisfied that the H defendant has shown the existence of any cause to the contrary which the defendant had failed to do so.

Distinction between Appeals against decision under O. 18 r. 19 and O. 14 of the Rules of the High Court 1980

[65] It is important to draw a distinction between appeals against a I decision made by the Registrar of the High Court under O. 18 r. 19 and under O. 14 of the RHC 1980. In respect of appeals against a decision under O. 18 r. 19 of the RHC 1980, it calls for review of the

A exercise of the Registrar's discretion and the appellate court is loath to interfere with the exercise of its discretion unless it is satisfied that the Registrar was clearly wrong. (See *United Malayan Banking Corporation Bhd v. Pembinaan Ksy Sdn Bhd & Ors* [1993] 3 MLJ 45, *Davy v. Garrett* [1877] Ch. D. 473). On the other hand, appeals against the decision of
B the Registrar of the High Court under O. 14 of the RHC 1980, is heard as a rehearing. (See *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, *Seloga Jaya Sdn Bhd v.*
C *Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 96, *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241).

[66] This court is of the view that the plaintiff ought not to be deprived of his statutory right to enforce the charges purely and solely on the
D ground that no step was taken to have the said vesting order registered or served on the Registrar of Titles as contended by learned counsel for the defendant as ignorance or even carelessness on the part of the solicitors if it exists ought not to be visited upon the litigant. The degree of prejudice caused to the plaintiff must be considered and balanced
E against the prejudice if any, caused to the defendant. The plaintiff who has stepped into the shoes of the predecessor bank is to follow up and take the necessary steps as provided under the law and the said vesting order to enforce the existing registered charge which is what the plaintiff has applied to do in the instant case and this does not prejudice or is
F shown to have prejudiced the defendant. On the contrary it appears to be a desperate attempt to deny and escape liability or delay the proceedings. In the instant case the degree of prejudice or possible risk of prejudice caused to the plaintiff is far more grave than to the defendant which none exists against the defendant. This court is also unable to appreciate how the non registration or to cause to register the
G said vesting order now at the Registrar of Titles can cause injustice to anyone or offend against the public weal. In fact this is a case where justice clearly requires that this court should allow the plaintiff's solicitors to proceed with the amended originating summons. Indeed if this court were to deny the plaintiff the statutory remedy pursuant to the chargee
H which have been registered "the purpose of justice would clearly be stultified". On the balance it would do better justice in refusing the defendant's application to strike out the amended originating summons filed by the plaintiff.

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[67] In *Coruma Holdings Ltd. v. C. Itoh Ltd. & Ors* [1990] 3 ACSR 438, Rogers CJ observed at p. 448: A

> a commercial judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community

and the above observation was endorsed by the Federal Court in B *Co-operative Central Bank (In receivership) v. Fesyen Development Sdn Bhd* [1995] 4 CLJ 300.

[68] In *A.R.R.M Arunasalam Chetty Son of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style of Mun Seng Hin Kee & Ors* [1937] MLJ C Rep 16, Terrell Ag. C.J at p. 20 said as follows:

> It is the duty of the Courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds. Registration of titles was introduced to prevent D fraud, but to use it for the purpose of prohibiting, or rendering nugatory, ordinary commercial transactions not expressly covered by the Enactment, is to enable the Enactment to be used as an instrument of fraud.

[69] In *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 E CLJ 532, His Lordship Gopal Sri Ram JCA at p. 540 said as follows:

> Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasised that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. So, when a F party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the G answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint.

[70] However, this court is of the considered view and wish to reiterate that it is important to note that the requirement to cause the registration of the said vesting order is merely an administrative process for the H Registrar of the High Court in Malaya to show to the whole world that the plaintiff is now vested with all the powers as the predecessor bank by virtue of the said vesting order. However, the failure to register the said vesting order does not necessarily affect or deny the plaintiff who has been vested with the rights pursuant to the said vesting order to I enforce the statutory remedy under the existing registered charge.

[71] Whilst, statutory provisions which are mandatory in nature cannot be disregarded, it cannot at the same time deny a financial institution who has given out huge sums of loan to a borrower, from enforcing its legal right merely due to a procedural non compliance where it is not shown to have caused any prejudice to the borrower. The court must be prepared to trim off all the procedural hindrances which are thrown at the court especially in commercial actions or claim if the end result would be to impede justice and deny the lender from enforcing his statutory remedy to recover the loan as in the instant case. In *Sia Siew Hong & 7 Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26. His Lordship Gopal Sri Ram JCA said:

> Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation … The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct.

[72] In *Co-Operative Central Bank Ltd (In receivership) v. Feyen Development* [1995] 3 MLJ 313 although not so directly in point, His Lordship Edgar Joseph Jr (FCJ) said at pp. 329-330, had this to observe in respect of the defence of illegality raised to a commercial transactions and referring to the Australian case in *Coruma Holdings Ltd & Ors v. C Itoh & Ors* [1990] 3 ACSR. "… At the end of the day, Rogers CJ did not find it necessary to rule on whether the impugned transactions had offended s. 230 because even assuming that they did, the breaches were 'highly technical' and so did not result in the loans transactions being rendered void or unenforceable". He recognized that whilst it would frustrate Parliament's intention to restrict the scope of s. 234, it would be equally unjust to invoke the section to commercial transactions free from the taint of misapplication of the companies' resources which the section was aimed at preventing. His Lordship Edgar Joseph Jr (FCJ) said:

> We would go further and say that to admit the defence of illegality to defeat the chargee's society's application to enforce the charges by way of any order for sale, would, in the words of Mason J (as he then was) in Yango Pastoral (at p. 428), provide, 'a windfall gain' to the charger company and others in a similar position. In consequence, such a result would impose substantial hardship upon the chargee society for, in the words of Gibbs CJ in Yango Pastoral (at p. 415, paragraph 1):

> ... if a body corporate were unable to recover money that it has lent, it would be disabled from performing its own obligations, including those owed to its depositors.In those circumstances the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute (*Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.* ([1961] 1 QB, at p. 390); *Dalgety and New Zealand Loan Ltd. v. V.C. Imeson Pty. Ltd.* ([1963] 63 SR (NSW) 998, at p. 1004).

[73] On the argument above-mentioned, this court is of the considered view that the defendant cannot be allowed to use the non registration of the vesting order as a shield against the statutory remedy available to the plaintiff to enforce the registered charge for default of payment under the existing registered charge. Despite the persuasive submissions of learned counsel for the defendant on the statutory interpretation and the torrens system in this jurisdiction, this court is not convinced that this is an appropriate case to strike out the amended originating summons under O. 18 r. 19(1)(a) or under the inherent jurisdiction of the court under O. 92 r. 4 of the RHC 1980. In *Yorkshire Regional Health Authority v. Fairclough Building Ltd. And Anor* [1996] 1 All ER 519, Evan LJ said at p. 529:

> Only if the court was obsessed by the strictly literal interpretation and oblivious to the common sense of the matter could the conclusion be entertained. To his credit, Mr. Blackburn QC for the appellants openly acknowledged the extreme technicality of his business, and their lack of merits, and he has made them dispassionately and with professional skill.

[74] In *R v. The Committee of Llyod's ex parte Moran Queen's Bench Division*, The times 24 June 1983; Mustill J said:

> A statute or contract cannot be interpreted according to its literal meaning without testing this meaning against the practical outcome of giving effect to it. If the result does not make sense, the interpretation must be rejected.

[75] On the totality of the materials available in the instant case, this court is satisfied that the learned Senior Assistant Registrar has not erred in law when she exercised her discretion to dismiss the defendant's application to strike out the amended originating summons filed by the plaintiff. (See *United Malayan Banking Corp Bhd v. Tan Kay Hock* [1997] 4 CLJ 717. In fact, this court finds there is no compelling reason to withhold or deny the statutory relief sought by the plaintiff pursuant

A s. 256 of the NLC and based on the said vesting order. (See *Leong Moh Sawmill Co Sdn Bhd (In Liquidation) v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131). It is important to note that first, the power to strike out was, and still is discretionary. Secondly, the power only arises if the proceeding disclosed no reasonable cause of action or defence. B (See *Williams and Humbert Ltd v. W & H Trade Marks (Jersey) Ltd* [1986] 1 AC 368 at p. 411). It is therefore not an appropriate case to strike out the plaintiff's amended originating summons under O. 18 r. 19(1)(a) or under the inherent jurisdiction (O. 92 r. 4 of the RHC 1980).

C **[76]** Accordingly, this appeal (encl. 10) by the defendant against the decision of the learned Senior Assistant Registrar given on 15 September 2003 is dismissed. Each party to bear its own costs. The plaintiff is at liberty to presently serve the vesting order on the Registrar of Titles. However, pursuant to the inherent jurisdiction of this court as provided under O. 92 r. 4 of the Rules of the High Court 1980, and D s. 417 of the National Land Code, this court directs the Registrar of this court to send a copy of the vesting order to the Registrar of Titles, Ipoh which is purely an administrative act.

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